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Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

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Re: LEC Virtual Collocation Tariff Investigation
CC Docket 94-97, Phase II

Dear Mr. Caton:

On November 9, 1995, Time Warner Communications ("TWComm") filed its Comments on Direct Cases submitted by various local exchange carriers in response to the Commission's Order Designating Issues for Investigation in the above-captioned proceeding.¹ In its November 22, 1995 Rebuttal to Oppositions filed in response to its Direct Case, Southwestern Bell Telephone Company ("SWBT") responded to comments submitted by TWComm and other commenting parties challenging the direct cost components of SWBT's virtual collocation ("VEIS") rates, as well as other terms and conditions contained in SWBT's VEIS tariff which appear inconsistent with the Commission's expanded interconnection rules and policies. TWComm will not attempt to reply at this time to all of the specious arguments and mischaracterizations employed by SWBT, in a vain effort to defend its VEIS tariff rates, terms and related practices. However, TWComm does feel compelled to address certain statements made by SWBT in its Rebuttal which purport to cast doubt on the credibility of TWComm's comments and, in particular, its assertions concerning SWBT's attempts

¹ Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation For Special Access and Switched Transport, CC Docket No. 94-97, Phase II, Order Designating Issues for Investigation, DA 95-2001 (released September 19, 1995) ("Designation Order").

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Mr. William F. Caton
December 13, 1995
Page 2

to ensure that TWComm and other potential competitors pay an exorbitant price for interconnector-designated equipment ("IDE").²

In a transparent attempt to divert the Commission's attention from its own anticompetitive conduct, SWBT responds to TWComm's discussion of SWBT's efforts to ensure that its competitors pay inflated prices for IDE³ with a personal attack on TWComm's analyst which mischaracterizes TWComm's comments and misstates the relevant issues. More importantly, SWBT's Rebuttal provides no assurance that SWBT will not continue to attempt to raise its rivals' costs, as part of its ongoing effort to undermine the effective implementation of the Commission's virtual collocation regime. To the contrary, SWBT's response to the issues raised by TWComm confirms that SWBT intends to pursue this objective through tariff provisions and practices which are designed to artificially inflate the cost of IDE itself and related costs.

As an initial matter, contrary to SWBT's implied assertions, the correspondence appended as Attachment B to TWComm's comments was not offered as support for any assertion by TWComm that the rates for IDE in SWBT's original September 1, 1994 interstate virtual collocation tariff were based on vendor "list" prices for IDE. As a result of SWBT's thus-far successful effort to prevent disclosure of the relevant IDE cost data on the public record, TWComm cannot and has not made any statements to this effect. However, SWBT does not allow the fact that no such assertion was made to deter it from attacking the credibility of TWComm and its analyst for having purportedly made such a claim. Having misstated TWComm's position, SWBT goes on to challenge TWComm's purported assertion, arguing that AT&T's submission of a data request in the Texas VEIS proceeding -- referencing SWBT's claim that it used "negotiated" prices, rather than "list" prices, for its initial interstate VEIS tariff -- constitutes proof that Time Warner's analyst "knows" that the statement which SWBT erroneously ascribes to TWComm is false.

In reality, however, the issue raised by TWComm is different from and indeed much broader than the "straw man" which SWBT seeks to attack. Even if it is assumed that the withheld IDE cost data information confirms that SWBT's current

² See TWComm Comments at 20-24. TWComm reserves the right to address other aspects of the VEIS tariffs filed by SWBT and other LECs in separate ex parte presentations.

³ SWBT Rebuttal at 16-20.

interstate VEIS rates are not based on vendor "list" prices,⁴ a legitimate concern continues to exist regarding the assumptions used in the development of SWBT's rates for IDE and related cost components. In this regard, TWComm appropriately raised concerns regarding SWBT's efforts to prompt its equipment vendors to charge it "list" prices for IDE on a going forward basis, citing SWBT's letters to IDE vendors. In those letters, SWBT repeatedly emphasizes that the "risk of unwanted disclosure of negotiated prices significantly increases if the prices charged SWBT for the equipment provisioned for virtual collocation are not the 'list' prices," and invites the vendors to charge it the higher "list" price, in order to avoid this risk.⁵

However, TWComm's concerns are not limited to the possibility that vendors will choose to accept SWBT's invitation to charge full "list" prices for IDE, either now or in the future. TWComm also remains concerned that SWBT's current IDE rates for IDE are unreasonable.⁶ All publicly-available information indicates that, whether or not full "list" prices have been employed, the IDE rates contained in SWBT's current VEIS tariff are excessive.⁷

⁴ In its Rebuttal, SWBT acknowledges that rates for at least one vendor's IDE "are based on list price," asserting (without any documentation) that the "list" price was used because "a negotiated price did not exist for Alcatel IDE." SWBT Rebuttal at 17, n.26. Interestingly, this assertion appears to be inconsistent with statements made in SWBT's April 27, 1995 letter to Alcatel, which notes that while SWBT's initial interstate VEIS tariff utilized "negotiated" prices, "[a]fter the possibility of disclosure became apparent, Alcatel provided SWBT with 'list' prices" that were utilized in SWBT's subsequent intrastate VEIS filing. See TW Comments, Appendix B, Letter from Larry M. Exler, SWBT Contract Manager, to Mr. Frank Kostello, Alcatel Network Systems (April 27, 1995).

⁵ See Attachment B, TWComm Comments.

⁶ It is currently not possible, based on publicly-available information, to reconcile the differences between the rates proposed by SWBT and the rates proposed by other LECs. If the differences in the level of overhead loadings used in the rate development process are insufficient to explain rate differentials, then these rate differentials must -- by definition -- be a result of differences in initial assumptions regarding the cost of input (e.g., IDE costs).

⁷ Indeed, several other interconnectors have independently reached this conclusion. In this regard, TWComm notes that MCI has provided an analysis, based
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These already excessive existing rates will, of course, be further increased if SWBT's vendors accept its standing invitation to charge list prices for equipment procured as IDE, while charging the negotiated "best price" when the same equipment is to be used to provide SWBT's competing DS-1/DS-3 services. In its Rebuttal, SWBT merely asserts once again, without any documentation, that "SWBT's best negotiated prices were used" in its initial interstate IDE tariffs.⁸ As for the future, SWBT explicitly states that such negotiated prices will continue to be used only "so long as the vendor does not charge SWBT list for equipment to be used as IDE."⁹ Accordingly, there would appear to be no assurance that interconnectors will not be forced to pay full "list" price for IDE, while SWBT reaps the benefits of negotiated discounts in the price of equipment used to provide its own competitive services.¹⁰

Moreover, as TWComm observed in its comments, SWBT's use of excessive IDE costs adversely affects other components of its VEIS tariff rates (e.g., maintenance/ repair, power costs) as well.¹¹ Based on its above-described rebuttal of an assertion never made by TWComm, SWBT goes on to declare TWComm's analysis of SWBT's maintenance and power costs "fatally flawed."¹² The argument

⁷(...continued)

on publicly available information, which suggests that SWBT's IDE rates are excessive. See MCI Opposition to Direct Cases at 10-11. In its Opposition, MFS also has argued that SWBT's IDE rates are unreasonable. See MFS Opposition to Direct Cases at 12-13.

⁸ SWBT Rebuttal at 20.

⁹ Id.

¹⁰ Under this scenario, interconnectors would be in effect providing subsidies to the incumbent LEC, in the form of vendor discounts which are based in part on the volume of equipment purchased by SWBT for use as IDE.

¹¹ See TWComm Comments at 27-29, 32-35.

¹² SWBT Rebuttal, p. 20. As the discussion above indicates, SWBT's claim that TWComm's analysis "proceeds with assumptions it knows are wrong" is factually incorrect. TWComm's argument does not depend on any specific assumption about whether list prices have been assumed for IDE, but instead holds if SWBT has used anything other than the negotiated, fully discounted cost of acquiring IDE. All

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that TWComm actually made in its Comments remains valid, however: If SWBT applies the expense portion of an annual cost factor to an inflated investment assumption, expenses will be overstated both on a per unit basis and in the aggregate. This process inevitably will yield rates that are excessive and which will artificially raise the costs of SWBT's competitors.

Finally, SWBT argues that its offer to "buy IDE from interconnectors for \$1" should obviate any concern that interconnectors may have regarding the level of IDE rates.¹³ However, such an offer wholly fails to eliminate TWComm's concerns, for several reasons. First, a "\$1 sale agreement" is simply not equivalent to a "\$1 sale and repurchase" agreement. SWBT's proposal creates the possibility of an interconnector being forced to abandon equipment that is otherwise reusable by the interconnector and potentially by SWBT. In contrast, the "\$1 sale and repurchase" arrangements employed by virtually all other LECs fully protects the LEC and grants the interconnector some ability to exercise control over its costs, while permitting an interconnector to reuse the equipment that it has purchased. Second, SWBT qualifies its offer with the requirement that "the interconnector-as-vendor is willing to enter into a purchase agreement containing terms and conditions substantially similar to those SWBT demands of any vendor," without indicating what these terms and conditions might be. Terms and conditions previously imposed by SWBT in connection with its proposed purchase of IDE from interconnectors have been found to be patently unlawful.¹⁴ With this history in mind, TWComm is reluctant to accept SWBT's terms and conditions, in the absence of more complete information concerning the precise nature of the obligations which SWBT seeks to impose on interconnectors seeking to sell IDE to SWBT under such an arrangement.

In short, SWBT has attempted to divert attention from the real issues in this investigation by calling into question the credibility of TWComm and its analyst. TWComm urges the Commission to resist SWBT's latest attempt to sidetrack the

¹²(...continued)

currently available public information strongly suggests that this is the case. Of course, if vendors accept SWBT's invitation to charge full "list" prices, the reported level of expenses will be further inflated.

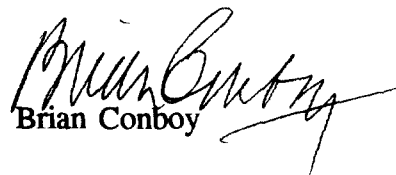
¹³ SWBT Rebuttal at 20.

¹⁴ See Designation Order at ¶ 8, citing Order, Ameritech Operating Companies et al., CC Docket No. 94-97, ("Virtual Collocation Tariff Suspension Order"), 10 FCC Rcd 1960, 1987-88 (1994).

Mr. William F. Caton
December 13, 1995
Page 6

current investigation and undermine the pro-competitive policies which the Commission's VEIS regime is designed to promote. Rather, the Commission should make every effort to see that its investigation is brought to an expeditious conclusion and issue an order directing SWBT to eliminate or revise those VEIS tariff provisions which TWComm and other commenting parties have demonstrated are inconsistent with the Commission's expanded interconnection rules and policies.

Sincerely,


Brian Conboy

cc: Geraldine Matisse
Paul D'Ari
Carol Canteen
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CERTIFICATE OF SERVICE

I, John L. McGrew, do hereby certify that on this 13th day of December, 1995, copies of the foregoing Ex Parte filing by Time Warner Communications Holdings, Inc. were delivered by first class mail, unless otherwise indicated, to the following parties:

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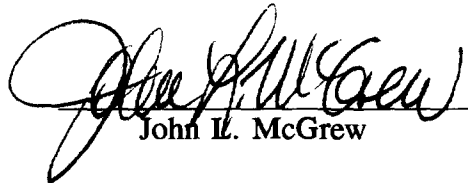
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